83 - 1772

NO.

In the Supreme Court of the United States

OCTOBER TERM, 1983

MOYE WAYNE WOOLARD,

Petitioner

vs.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court err in holding that the testimony of Defendant-Petitioner, which related solely to stale transactions, barred by the statute of limitations, was a material prejury to an ongoing grand jury investigation?

2. Did the District Court err in holding that the sole statement of a grand juror that "we were investigating bribery" is sufficient to establish a material perjury as a matter of law under 18 U.S.C. § 1623?

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Comes now the Petitioner Moye Wayne Woolard, and submits this, his Petition for Writ of Certiorari in the above styled and numbered cause.

OPINION BELOW

The opinion of the Court of Appeals below was not reported. The opinion of the District Court below was not reported.

JURISDICTION

The judgment of the Court below was entered on March 23, 1984. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. Sect. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statute under which Petitioner was prosecuted, though nothing turns on its terms, was 18 U.S.C. 1623, which provided as follows:

> Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any Court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

The Fifth Amendment of the Constitution which provides that;

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal

case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS

INDICTMENT FOR TWO COUNTS OF PERJURY
A FELONY VIOLATION OF 18 U.S.C. §1623
October 14, 1982
(Vol. I—1-6)

JURY SELECTED AND EMPANELLED
May 2, 1983

VERDICT OF GUILTY RETURNED
May 5, 1983
(Vol. I—171)

JUDGMENT AND COMMITMENT ORDER
5 YEARS AND $10,000 FINE
June 2, 1983
(Vol. I—173)

NOTICE OF APPEAL GIVEN
June 8, 1983
(Vol. I—174)

COURT REPORTER'S NOTES FILED
August 5, 1983
(Vols. II-V—1)

APPELLANT'S BRIEF FILED
September 14, 1983

OPINION RENDERED
March 23, 1984

MOTION FOR STAY OF MANDATE FILED
April 10, 1984

PETITION FOR CERTIORARI DUE
April 23, 1984

STATEMENT OF MATERIAL FACTS

The Petitioner, Moye Wayne Woolard, was a merchandise and inventory manager for the Army and Air Force Exchange Service (AAFES) from 1963 until 1983. (Vol. IV—267, 269-272). During his tenure the Petitioner became acquainted with many vendors including Martin Taylor (Vol. II—135, 139), Martin Goodman (Vol. II—169, 174) and Anthony Mazziotti (Vol. III—227, 228).

In 1979, a grand jury was convened to investigate bribery within AAFES (Vol. II-123). Petitioner was compelled to testify under a grant of immunity before the grand jury regarding bribery and corruption outside the statute of limitations (Exhibit # 1 to Record on Appeal). This testimony was limited to transactions beyond the statute of limitations which were not part of a continuing course of conduct. Before the grand jury, he was asked in an accusatory fashion about receipt of bribes from Martin Taylor, Martin Goodman and Anthony Mazziotti, none of whom testified before the grand jury or had even given a sworn statement (Exhibit # 1, Vol. II—15, 25, 27; Vol. III—211-212).

Two years later, in 1982, an F.B.I. case agent testified before a different grand jury as a summary witness. He told that grand jury that Petitioner had perjured himself in 1980. The case agent did not have a sworn statement from any of the witnesses at the time he made that pronunciamento. Without hearing from any other

witnesses, the grand jury indicted Petitioner under the Federal perjury statute, 18 U.S.C. § 1623. (Exhibit # 2).

Petitioner's argument that such a course of conduct indicated an abuse of the grand jury process was overruled by the trial court. (Vol. I—117-124; Vol. II—46-54).

By pre-trial motion to dismiss, Petitioner raised the issue that his grand jury testimony could not be perjury because it failed to satisfy the criterion of materiality. (Vol. I—117-124). The trial court ruled against Petitioner having read only Petitioner's grand jury testimony. In fact, the judge specifically refused to read any other testimony from the first grand jury and did not have the case agent's summary testimony read nor transcribed until after trial. (Vol. II—13, 18, 20).

SIGNIFICANCE OF QUESTIONS RAISED AND REASONS FOR ALLOWANCE OF WRIT

This is a case of first impression under the Federal perjury statute, 18 U.S.C. § 1623. The Fifth Circuit has decided important questions of Federal law in conflict with established principals.

In order for a false statement to be perjury, the statement must be material. To be material, the Courts heretofore have held that it must tend to hamper, mislead or influence the grand jury investigation or an issue properly before the grand jury—one on which it could conduct further examination or return an indictment. *United States v. Thompson*, 637 F.2d 267 (5th Cir. 1981); *United States v. Giarratano*, 622 F.2d 1153 (5th Cir. 1980). The indictment in this case utterly fails to meet that established test.

The Appellant was compelled to testify under grant of immunity regarding only transactions outside of the statute of limitations and not part of any continuing course of conduct. Since this was the parameters of inquiry, his testimony could not have led to other people who could be indicted, which is an important criterion for ascertaining materiality. See *United States v. Cuestra*, 597 F.2d 903 (5th Cir. 1979) *cert. den'd.* 100 S.Ct. 451. Assuming *arguendo* that his testimony was false, true answers and follow up questions could not have led to timely and germaine questions within the limitations period. Remote transactions were not properly before the first grand jury. This criterion is also important. See *United States v. Nixon*, 631 F.2d 306 (5th Cir. 1981). In that case the defendant could not be prosecuted for a specific transaction because of violation of the speedy trial act but could have been prosecuted for other transactions within the period of limitations. In this case the Petitioner could not have been indicted for any transaction. Further, since the Petitioner was the only person who testified about these transactions, his testimony could not have corroborated nor bolstered the credibility of any other witness, a third established criterion. Indeed in a red light swearing match, if only one side is heard, the witness cannot logically contradict any other testimony and the finder of fact cannot determine his credibility.

Whether the answer tended to "mislead" or in any way "hamper" the investigation (see *United States v. Thompson, supra*) is a question which ultimately could be answered only by one or more members of the first grand jury. What weight, if any, was attached to Petitioner's testimony is also a matter within the exclusive knowledge of the first grand jurors—none of whom ever testified or gave a statement regarding the issue.

For all the record shows, Petitioner could have been the last witness, and his testimony purely tangential to the issues of concern to the grand jury. The trial court decided the issue of materiality in an *absolute vacuum*, as did the Court of Appeals. The workings of the grand jury were never considered nor made a part of the record. The case agent alone made the determination that Petitioner's testimony was somehow material, the grand jury rubber-stamped that belief and the trial court accepted it at face value without a whit of further inquiry.

This is a case of first impression in that the indictment in this case is based upon such a flimsy record and tenuous premise. The grand jury's purpose and field of inquiry was merely stated as "bibery". (Vol. II—21). A more elaborate showing of materiality than that one sentence has been required in the Second Circuit. See *United States v. Berardi*, 629 F.2d 723, 727 (2nd Cir. 1980). The prosecution used that broad and vague statement of purpose to cast a net over Petitioner's testimony, but it is pure speculation to state categorically, as the trial court did, that the Petitioner's testimony was material to this investigation. How does anyone know, from the record, whether Petitioner's "bribes" were within the scope of "bribes" being considered by the grand jury? The foreman of the grand jury testified at the pre-trial hearing and the prosecutor declined to ask one question regarding materiality. (Vol. II—30-32). The entire transcript, or at the very least, other portions relating to Petitioner, may have been available, but were not even considered. These, at least could have put Petitioner's testimony in some context where materiality could have been established. What possible justification is there for failing to take these steps? In the absence of any other proof, why should Petitioner's testimony be conclusively presumed to be material?

Petitioner contends that, under the unique circumstances presented therein, the prosecutor utterly failed, and in fact consciously declined, to establish materiality of the alleged false statements. Based on the record as it existed before the trial court it had no alternative but to order a dismissal and its failure to do so is error. Such a holding would be entirely consistent with the Second Circuit's rulings that, in order to establish materiality, a full transcript of the proceedings must be considered or a member of the grand jury must state that the testimony was material. *United States v. Berardi, supra.*

CONCLUSION

These issues should be addressed in order to clarify the burden of proof necessary to establish "materiality" in all the Circuits. The Fifth Circuit's holding that "stale" testimony is material and that materiality may be established by a single, broad statement is an important denial of law established in other Circuits.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Petition for Writ of Certiorari have been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto this the 20th day of April, 1984.

FRANK JACKSON

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-1392

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MOYE WAYNE WOOLARD,

Defendant-Appellant.

Appeal from the United States District Court for
the Northern District of Texas

(March 23, 1984)

Before BROWN, REAVLEY and WILLIAMS, Circuit Judges.

PER CURIAM:

Appellant Woolard was convicted of making false material statements before a grand jury in violation of 18 U.S.C. § 1623. A long time employee and executive of the Army and Air Force Exchange Service (AAFES), Woolard in 1980 told a grand jury investigating corruption and bribery within the AAFES that he had received no cash or thing of value during the years 1963 to 1974 from either of

two sales representatives who did business with the AAFES, Martin Goodman and Anthony Mazziotti. Goodman testified that he made many gifts to Woolard during those years. For a period the cash gifts averaged several hundred dollars a month and included one gift of $3500. Woolard continued to deny receipt of any significant gifts in his trial testimony. The jury believed Goodman. The conviction is affirmed.

Appellant begins his points of error by arguing that the materiality of the testimony before the grand jury was not proved. To support that argument he says that by the time of his testimony, limitations had barred his indictment for bribes taken during the years 1974 and earlier; and he seems to contend that the judge must examine a full transcript from the grand jury or have a member of the grand jury testify expressly to the weight or effect given to the particular testimony of the defendant. The foreman of the grand jury testified to the broad scope of their investigation, which was a proper method of establishing the fact. *United States v. Thompson*, 637 F.2d 267, 268 (5th Cir. 1981). Whether or not the testimony related to an offense presently indictable against Woolard, his testimony about gifts from vendors doing business with AAFES was obviously material to the inquiry into corruption and bribery within the AAFES. *See United States v. Cosby*, 601 F.2d 754, 756 (5th Cir. 1979); *United States v. Cuesta*, 597 F.2d 903, 921 (5th Cir. 1979).

Appellant then complains that the grand jury which returned the perjury indictment in 1982 did not hear from Goodman or Mazziotti but relied upon the conclusion of an F.B.I. agent as to what those two men stated the facts to be. This was entirely proper; we do not review the sufficiency of the evidence before the grand jury or apply the rules

of evidence to its deliberations. *United States v. Cruz*, 478 F.2d 408 (5th Cir. 1973).

Appellant suggests that he was targeted and the first grand jury was misused, citing *Beverly v. United States*, 468 F.2d 732 (5th Cir. 1972), which discusses the use of a grand jury as a substitute for discovery to prepare an already pending indictment for trial. There is no indication of misuse in the present case; the grand jury before which appellant testified did not indict him and had no pending indictment against him to which to relate his testimony.

At the trial the witness Mazziotti testified that he gave to his partner Goodman half of the cash payments to be made to Woolard. Mazziotti went further and testified that these transfers of cash were made by Goodman to Woolard, which was hearsay. However, the declarant Goodman testified personally about the transfers. There was no confusion before the jury or prejudice to Woolard about what Mazziotti did or did not personally observe.

Appellant complains because the trial judge would not allow him to prove by the witness Hall a prior inconsistent statement: that appellant would not take bribes. Appellant had not asked Mazziotti about a particular statement to Hall, nor was a proffer of proof made of exactly what Hall could have testified. In any event the statements of Mazziotti to his employee about bribery of AAFES personnel, made while secrecy was being maintained, could not have had any conceivable effect on the jury's appraisal of the credibility of Mazziotti's testimony.

Appellant speculated in his testimony as to why his former friends testified that they gave him cash gifts, and

the prosecutor then asked if he was being picked upon or if those adverse witnesses were treating him any differently when they had already testified against other AAFES employees. Appellant complains because the reference to other crimes and convictions made the jury think a major conspiracy existed and informed them that other juries had accepted the testimony of these adverse witnesses. But the jury was well aware of the AAFES inquiry and the fact of other trials. That these witneses had testified in other trials seems to us to have been immaterial to both the prosecution and the defense. We regard it to have been within the discretion of the trial judge, however, to allow the question to be put to appellant, and it could have had no harmful effect upon his defense.

Finally, appellant contends that the Jencks Act, 18 US..C. § 3500, entitled him to a copy of the F.B.I. agent's testimony before the indicting grand jury. The Jencks Act entitles a defendant to any prior statement, in the possession of the government, relating to the subject matter of the testimony of a witness. The agent testified at trial only on the defendant's reputation for truth and veracity. Appellant argues, however, that the agent's statement to the grand jury about statements to him by witnesses Goodman and Mazziotti fell under Jencks. If the agent had made his record of oral statements of these witnesses in substantially verbatim form to meet the definition of "statement" in the Jencks Act, appellant's argument might have some merit. We have reviewed the agent's testimony before the grand jury. It incorporates no "statements" of the other trial witnesses. Nor does it suggest any inconsistencies in the testimony or reflect anything helpful to appellant's defense.

AFFIRMED.